Supreme Court, U. S.
FILED
JUN 21 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1805

DEVERNON LEGRAND,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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In The
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DEVERNON LEGRAND,

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

The Petitioner Devernon LeGrand,[1] respectfully prays that a Writ of Certiorari issue to review the Order of the New York State Court of Appeals declining to review the affirmance of his criminal conviction in the Supreme Court of the State of New York in and for the County of Kings.[2]

OPINION BELOW

The April 10th, 1978, Order of the New York State Court of Appeals denying leave to appeal pursuant to New

1. Hereinafter referred to as "LeGrand."
2. The docket Number of this case is "Indictment Number 1445/1976."

York Criminal Procedure Law §460.20, from the Order of the New York Appellate Division, Second Judicial Department, dated February 14th 1978, is not yet reported.

The Order of the New York Court of Appeals is set forth in Appendix "A" (1a) and the Order and Opinion of the New York Appellate Division, Second Department appears in Appendix "B" (2a).

JURISDICTION

The Order denying leave of the New York Court of Appeals was filed April 10th, 1978, and this petition for Certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

According to the evidence from a prosecution viewpoint, during the night of May 1st, 1970, LeGrand in a drunken rage punched, stomped and kicked one Ernestine Timmons, a woman living in his household. The following morning, LeGrand asked his wife, also living in his household, to see if Timmons wanted something to eat. Shortly thereafter, LeGrand learned from his wife that Timmons was dead.

LeGrand was indicted on May 12th, 1976, over six years after the incident for two counts of Murder: the first count under PL §125.25(1) was drafted in the common-law form or intentional killing and the second count under PL §125.25(2) for the same offense under a theory of "depraved indifference." Murder is not time-barred by the New York Statute of Limitations while Manslaughter is barred by a five years statute of limitations, CPL §30.10. The New York State trial court after agreeing to instruct the jury on the lesser included offense of Manslaughter in the second degree, PL §125.15(1), refused to do so unless the defendant LeGrand waived his defense of the five years statute of limitation. LeGrand refused to waive the defense and insisted upon the lesser included offense. Thereupon, the Court refused the instruction. New York mandates the instruction of the lesser charge upon request of the defendant, CPL §300.50(2). LeGrand was acquitted of Murder (intentional killing) and convicted of Murder (depraved indifference).

Within the context of the factual question, the following point is raised under the Due Process Clause of the Fourteenth Amendment, U.S. Constitution:

1. Was it proper for the trial court to refuse to charge a mandated lesser included count of Manslaughter, reasonably supported by the evidence in the view of the Court, unless the defendant LeGrand waived beforehand any defense under the statute of limitations?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment, United States Constitution:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law;

CPL §30.10. Timeliness of prosecutions; periods of limitation

1. A criminal action must be commenced within the period of limitation prescribed in the ensuing subdivisions of this section.

2. Except as otherwise provided in subdivision three:

(a) A prosecution for a class A felony may be commenced at any time;

(b) A prosecution for any other felony must be commenced within five years after the commission thereof;

(c) A prosecution for a misdemeanor must be commenced within two years after the commission thereof;

(d) A prosecution for a petty offense must be commenced within one year after the commission thereof.

CPL §300.50 Court's charge; submission of lesser included offenses

1. In submitting a count of an indictment to the jury, the court in its discretion may, in addition to submitting the greatest offense which it is required to submit, submit in the alternative any lesser included offense if there is a reasonable view of the evidence which would support a finding that the defendant committed such lesser offense but did not commit the greater. If there is no reasonable view of the evidence which would support such a finding, the court may not submit such lesser offense. Any error respecting such submission, however, is waived by the defendant unless he objects thereto before the jury retires to deliberate.

2. If the court is authorized by subdivision one to submit a lesser included offense and is requested by either party to do so, it must do so. In the absence of such a request, the court's failure to submit such offense does not constitute error.

PL §125.15 Manslaughter in the second degree

A person is guilty of manslaughter in the second degree when:

1. He recklessly causes the death of another person; or

2. He commits upon a female an abortional act which causes her death, unless such abortional act is justifiable pursuant to subdivision three of section 125.05; or

3. He intentionally causes or aids another person to commit suicide.

Manslaughter in the second degree is a class C felony. L. 1965, c. 1030.

PL §125.25 Murder in the second degree

A person is gulty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime; or

(b) The defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the second degree or any other crime; or

2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person; or . . .

STATEMENT OF THE CASE

1. The Indictment, Conviction and Sentence.

The indictment in the instant case was filed May 12th, 1976. It charged LeGrand with two counts of the crime of Murder, both involving the same alleged victim, one Ernestine Timmons, and each allegedly committed on or about May 1st, 1970. The first count charged LeGrand

under an intentional murder theory, PL §125.25(1), while the second count charged under the "depraved indifference to human life" theory, PL §125.25(2). LeGrand was acquitted of intentional murder and convicted of "depraved indifference."

On July 29th, 1977, LeGrand received a sentence to New York State Prison for a term of twenty-five years to life. He is presently under service of that sentence.

2. Statement of Facts

On April 29th, 1970, Mrs. Agnes Timmons last saw her daughter Ernestine Timmons, being picked up in a car by the defendant LeGrand. Ernestine, who had been married to and divorced from LeGrand while continuing to live in his house at 222 Brooklyn Avenue, had left him several times to come back to live with the Timmons family at 656 Donough Street, Brooklyn, New York. On several occasions during 1968 and 1969, LeGrand had come to Mrs. Timmons and threatened to kill Ernestine if she did not come back to him (301-310).[3]

On the evening of May 1st, 1970, a Friday, LeGrand's current wife, Kathleen Kennedy LeGrand, noted that he began drinking heavily at about 5:00 p.m., and by the time he left the house, at about 6:30 p.m. he had drunk about half of a "fifth" bottle of Canadian Club. When he left the house, to continue his drinking at a bar nearby, he was high, and when he returned, at about 9:00 p.m., that evening he was drunk (580-581; 794-799).

As soon as LeGrand returned home he began screaming "where is that bitch Ernestine." He then went up to the top floor of the house and, screaming, "I will kill you bitch, I will get you bitch," forced Ernestine down the stairs and began punching, stomping and kicking her until she lay still, bleeding on the floor below (477-481; 596-597).

3. Paginations in parentheses are to the original state record.

The following morning, LeGrand asked Kathleen to see if Ernestine wanted something to eat. Kathleen went up to Ernestine's room and saw her lying on a bed. She was limp and had no heartbeat (481-484; 637-638). Later that morning, LeGrand had Kathleen clear the children out of the house, after which she heard the sound of Ernestine's body being dragged down to the basement (487-490).

Early Monday afternoon, Kathleen again cleared the house at LeGrand's request and waited on the parlor floor as a lookout while he went down to the cellar. She heard chopping noises coming from the cellar. After about 20 minutes, LeGrand's son, Vernon, banged on the door. LeGrand told her to let him in, and told Vernon to check the back of the house (493-500). Then Kathleen saw LeGrand carrying two big green garbage bags, dripping with blood, out of the back of the house, across the yard, into the garbage and into the trunk of his car, after which LeGrand drove the car away (498-501; 699-705, 714-719).

About forty minutes later, LeGrand called Kathleen on his car telephone and told her to give his stepson Darryl money to buy a mop and cleansers and to have him clean up downstairs, which she did. Kathleen accompanied Darryl to the cellar and observed a pool of blood and what appeared to be liver on the floor. Later, Darryl reported to her that he had cleaned up (501-504; 739).

REASONS FOR GRANTING THE WRIT

1. It was improper for the trial court to refuse to charge the lesser included offense of Manslaughter reasonably supported in its own view by the evidence unless the defendant LeGrand waived beforehand his defense of the statute of limitations.

The language of CPL §300.50(2) is mandatory in that it imposes upon the Court the obligation to charge lesser

included offenses if reasonably supported by the evidence. In this case there existed no dispute since the Court itself indicated that it would charge Manslaughter in the second degree, under CPL §300.50(2) which upon request is mandatory in that it imposes upon the Court the obligation to charge lesser included offenses if reasonably supported by the evidence. In this case there existed no dispute since the Court itself indicated that it would charge Manslaughter in the second degree, PL§125.15(1) under the count for which LeGrand was subsequently convicted. The Court, however, later reversed itself insisting in exacting as a condition or price for the instruction that the accused waive his defense of the statute of limitations barring the offense under CPL §30.10. The defendant refused to waive the defense and the Court refused the instruction which it was mandated to give by statute and in fairness to the accused. *People v. Perrera,* 40 AD2d 1023, 339 NYS2d 125 (2nd Dept. 1972); *People v. Johnson,* 46 AD2d 123, 361 NYS2d 921 (1st Dept. 1974); *People v. Sanders,* 45 AD2d 768, 357 NYS2d 131 (2nd Dept. 1974).

CPL §1.20(37) states that when it is impossible under the facts on the case on trial to commit a particular crime without concurrently committing by the same conduct another offense of lesser grade or degree, the latter is with respect to the former a lesser included offense. *People v. Hayes,* 43 AD2d 99, 349 NYS2d 869 (4th Dept. 1973); *People v. Flores,* 42 Ad2d 431, 348 NYS2d 425 (4th Dept. 1972); *People v. Cioneck,* 43 AD2d 256, 351 NYS2d 177 (3rd Dept. 1974).

It is clear that while under CPL §300.50(1) the Court has *discretionary* power to submit lesser included offenses if the same is justified by a reasonable view of the evidence, *it must do so* under CPL §300.50(2) if either party requests it. Failure by the Court to do so must result in reversal. *People v. Asan,* 22 NY2d 526, 293 NYS2d 326 (1968); *People v. Mussenden,* 308 NY 558, 127 NE2d 551

(1955). In this case it is clear that the petitioner LeGrand requested the lesser included offense of Manslaughter in the second degree which was supported in the Court's own view of the evidence *Foster v. People,* 50 N.Y. 598, (1872); *People v. Malave,* 21 NY2d 26, 286 NYS2d 245 (1967).

In the instant case, as the court determined, there clearly was a reasonable view of the evidence adduced by the prosecution under which the jury could have found defendant guilty of manslaughter. There was no evidence of premeditation. No weapon was involved. there was substantial evidence of appellant's intoxication at the time of the homicide from the prosecution's main witness. The evidence was such that the jury acquitted defendant of "intentional" murder and found him guilty of "depraved indifference" murder—a crime which has the same key element of reckless conduct as Manslaughter in the Second Degree [Penal Law, §125.15(1)], and is closely related thereto. *People v. France,* 57 A.D.2d 432, 394 N.Y.S.2d 891 (1st Dept. 1977). Under these circumstances, the submission of the charge of Manslaughter in the second degree was required under *People v. Henderson,* 41 NY 2d 233, 391 N.Y.S.2d 563 (1976), and was specifically requested by the defense (1947, 1193). Indeed, the Court initially granted defendant's request and then reversed itself only when defendant refused to waive the statute of limitations (1047, 1058-1064). This was error and a denial of due process. The indictment was returned in 1976, six years after the alleged homicide.

Under the evidence as presented to the jury, the defendant was entitled to have the jury determine either his innocence or, absent that, what degree of homicide he committed, including Manslaughter in the second degree. Indeed, he was entitled to the most favorable view of the evidence in considering submission of lesser charges. *Peo-*

ple v. Usher, 39 A.D. 2d 459, 336 N.Y.S. 2d 935, (1972); *People v. Battle,* 22 N.Y. 2d 323, 292 NYS 2d 713 (1968).

Assuming arguendo, that the jury returned a verdict of manslaughter in the second degree, such a verdict would have produced either of two results in law; either the verdict would have to be set aside as being barred by the statute of limitations or, alternatively, it would be upheld notwithstanding the statute of limitations. The trial court made no finding and reached no determination, on this issue but insisted that the defense waive the statute of limitations on the lesser included charge of Manslaughter. The Trial Judge could not exact a waiver of the statute of limitations as a *quid pro quo* for submitting the lesser degree to the trial jury. To do so would interfere with the jury's duty to decide impartially exactly what crime, if any, the defendant committed. The defendant was entitled to have that factual issue resolved in whatever lawful form the ultimate verdict might be. The Trial Judge is not empowered to prevent the jury from reaching a factually correct verdict merely because it may eventuate that the jury verdict is barred by the statute of limitations on any other defense available to the accused.

The same approach applies to the latter possible result. If the trial jury determines that the proper verdict be that of Manslaughter in the second degree and the law ultimately holds that the statute of limitations is inapplicable, then that lesser included verdict also must stand. The point remains that the defendant was entitled to have the jury—not the trial judge—decide what lawful verdict might be found by the jury.

In the final analysis both the prosecution and the defense are entitled to a jury verdict that announces the factually correct degree of the crime, if any, which was committed. The trial court's refusal to charge the lesser degree of Manslaughter in the second degree, improperly deprived the accused of that right and thus a fair trial.

The statute of limitations under CPL §30.10 is a defense which if not raised by the defendant is deemed waived. Limitations are matters of defense and must be raised by the defendant. *People v. Kohut,* 30 NY2d 183, 331 NYS2d 416 (1972). Failure to do so constitutes a waiver. *People v. Brady,* 257 Ad 1000, 13 NYS2d 789 (2nd Dept. 1939) CPL §210.45(7) provides that when the defense raises such a motion including one grounded upon the untimeliness of the prosecution the accused has the burden of proving by a preponderance of the evidence his contentions. CPL § 30.10 does not automatically bar a prosecution as time-barred unless the defendant raises the defense. He may waive it if he wishes so in *People v. Soto,* 76 Misc. 2d 491, 352 NYS2d 144 (Crim. Ct. Bronx Co. 1974), the defendant pleaded guilty to a lesser included misdemeanor offense to a felony charge although the lesser offense was time-barred by the statute of limitations. The point is that the Court cannot exact a condition of waiver from a defendant as the price for giving a jury instruction which it is mandated to do in any case.

CONCLUSION

For all the reasons stated herein, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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New York, New York
May 31st, 1978

APPENDIX "A"
CERTIFICATE DENYING LEAVE TO APPEAL
BY NEW YORK STATE COURT OF APPEALS

STATE OF NEW YORK
COURT OF APPEALS

Before: HON. LAWRENCE H. COOKE, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

DEVERNON LEGRAND,

Appellant.

I, LAWRENCE H. COOKE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Monticello, New York
April 10, 1978

s/Lawrence H. Cooke
Associate Judge

*Description of order: Order of the Appellate Division, Second Department, of February 14, 1978, affirming a judgment of the Supreme Court, Kings County, rendered July 19, 1977, convicting defendant of murder under former section 125.25 (subd 2) of the Penal Law (causing death "under circumstances evincing a depraved indifference to human life"), and imposing sentence.

APPENDIX "B"
OPINION OF THE NEW YORK STATE APPELLATE DIVISION, SECOND JUDICIAL DEPT.

December 13, 1977

___AD2d___

The People, etc., respondent,
v. Devernon LeGrand, appellant.

William Sonenshine, Brooklyn, N.Y., for appellant.

Eugene Gold, District Attorney, Brooklyn, N.Y. (Jay M. Cohen of counsel), for respondent.

Appeal by defendant from a judgment of the Supreme Court, Kings County, rendered July 29, 1977, convicting him of murder under former section 125.25 (subd. 2) of the Penal Law (causing death "under circumstances evincing a depraved indifference to human life"), upon a jury verdict, and imposing sentence.

Judgment affirmed.

Defendant was accused of having murdered his former wife. The evidence established that defendant resided in a large houwe with his wife, his former wife, their children and several other adults. He arrived home in a drunken state, called out for his former wife several times, cursing her, and proceeded to an upstairs bedroom to find her. He was then heard cursing her and she was heard pleading with him to stop hitting her; he was seen hitting and kicking her down the stairs. He body came to rest on a landing; she was bruised, apparently unconscious and bleeding. The next day she was found by defendant's wife in a bedroom in their house, beaten and lifeless. Defendant instructed his wife to clear the house of its several inhabitants, which she did, and then she heard

"plopping" sounds on the stairs, which was apparently the noise of defendant taking the body to the basement. The next day, defendant again directed his wife to clear the house and to prevent anyone from observing him, which she did. While defendant was in the basement, his wife could hear chopping noises; she then saw the defendant bring two large bloodied plastic garbage bags out of the house, put them into the trunk of his vehicle and drive away.

Defendant was indicted for both intentional murder (count one) and murder "under circumstances evincing a depraved indifference to human life" (count two) (Penal Law, former §125.25, subds. 1, 2).

The trial court denied defendant's requests to: (1) dismiss the second count of the indictment; (2) charge the jury that defendant's intoxication could be considered with relation to his ability to act in a manner evincing a depraved indifference towards human life in its deliberations with regard to the second count; (3) charge the jury as to the elements of manslaughter in the second degree, as a lesser included offense of murder under count two of the indictment; and (4) consider defendant's wife to have been an accomplice and charge the jury as to the need for corroboration of her testimony. It is our opinion that these rulings, alleged by defendant to have been erroneous, were correct.

Defendant contends that the essence of "depraved indifference" murder is the taking of action that places many in danger, that generally a single homicidal act directed at a particular individual does not constitute this crime and that the facts of this case do not support the charge. It has been held by this court, and by the Court of Appeals, that the element of "depraved indifference" murder which defendant claims is herein lacking, imperiling a multitude, is not necessary to support a charge or conviction of this crime (see *People v. Robinson,* 43 AD

2d 963; *People v. Kibbe,* 35 NY2d 407; *People v. Poplis,* 30 NY2d 85).

The element of the crime of murder as it was charged in the second count of defendant's indictment, acting "under circumstances evincing a depraved indifference to human life," is a qualitative judgment to be made by the jury in determining the extent of defendant's criminal action; it is not a description of the *mens rea* involved in the commission of the crime, which would appear to be supplied by the further requirement that the perpetrator acted "recklessly." Accordingly, acting "under circumstances evincing a depraved indifference to human life" is not an element of a crime which may be negated by intoxication (see Penal Law, § 15.25). It is significant, in this respect, we think, that the Legislature has specifically excepted the element of acting "recklessly" from those elements of crimes which may be negated by intoxication (Penal Law, §15.05, subd. 3).

The trial court took note of the fact that the Statute of Limitations had run with regard to the crime of manslaughter in the second degree and agreed to comply with defendant's request to charge that crime as a lesser included offense of the second count of murder, only if defendant would waive the Statute of Limitations defense; defendant refused and the trial court did not give the charge requested. We find no merit in defendant's argument that this constituted error.

Under the circumstances herein presented, a charge of manslaughter in the second degree as a lesser included crime would have been a useless gesture, since the only crime for which defendant could possibly have been found guilty was murder (cf. CPL 300.50). If defendant was in fact desirous of having a viable lesser included crime submitted to the jury (i.e., manslaughter in the second degree), he could have accepted the ultimatum which was properly offered to him by the trial court. Since he refus-

ed, he cannot be heard to object to the trial court's ruling.

Finally, the trial court properly refused to consider defendant's wife to have been an accomplice to his criminal actions. To be so considered, she would have had to have in some manner participated with him in the commission of the offense charged, or "[a]n offense based upon the same or some of the same facts or *conduct which constitute the offense charged*" (see CPL 60.22, subd. 2). Mrs. LeGrand did not so act. She failed to report the commission of the crime and *prevented* the *attendance of witnesses* to the *disposal* of the body. That conduct is not considered accessorial and the individual so acting is not an accomplice (see *People v. Dunn,* 53 Hun 381, 385).

We have considered the other claims asserted by defendant and have found them to be without merit.

MOLLEN, P.J., TITONE, SUOZZI and RABIN, JJ., concur.

February 14, 1978